

Decision **DRAFT DECISION OF ALJ VIETH** (Mailed 2/28/03)**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Application of Pacific Gas and Electric Company (U 39 M), a California Corporation, and the California Waterfowl Association, A California Public Benefit Corporation, for an Order Market Valuing and Authorizing the Former to Transfer to the Latter Certain Land in Shasta County (McArthur Swamp) and Related Property Pursuant to Public Utilities Code Sections 367(b) and 851.

Application 00-05-029
(Filed May 15, 2000)

Application of Pacific Gas and Electric Company (U 39 M), a California corporation, the State of California, acting by and through its Department of Parks and Recreation, with the approval of its Department of General Services (DPR), and the California Waterfowl Association, A California Public Benefit Corporation (CWA), for Orders Pursuant to Public Utilities Code Sections 367(b) and 851 (1) Establishing the Market Value of and Authorizing Pacific Gas and Electric Company to Transfer to DPR Certain Pieces of Land in Shasta County (Burney Falls) in Exchange for Land Currently Owned by DPR (Ahjumawi), and (2) Authorizing Pacific Gas and Electric Company to donate Ahjumawi to CWA.

Application 00-05-030
(Filed May 15, 2000)

**OPINION DISMISSING APPLICATIONS UNDER
PUB. UTIL. CODE § 377**

1. Summary

We determine that Pub. Util. Code § 377¹ bars the transfer of land and other property at issue in these consolidated applications filed by Pacific Gas and Electric Company (PG&E). We construe § 377 after considering the parties' briefs on this subject, previous decisions of this Commission and California case law, and federal accounting standards. We conclude that when harmonized, as they must be, the meaning of the disputed terms in § 377 (i.e., "facility for the generation of electricity" and "generation assets") requires dismissal of these applications. Accordingly, we do not reach the merits.

2. Factual Background

PG&E and the other named applicants to these consolidated applications propose two separate but partially related transfers of land and other property located in Shasta County. The proposals all include provisions by which PG&E explicitly retains all water rights in the transferred land, as well as rights to enter the land for maintenance and operation of existing transmission and distribution facilities. A summary of the proposed transactions follows.

Application (A.) 00-05-029 concerns the proposed transfer to the California Waterfowl Association (CWA), under a conservation easement, of approximately 7,400 acres of land commonly known as McArthur Swamp, as well as 5½-acre strip of land about one mile west referred to as the Glenburn Dredge Site and the

¹ Unless otherwise indicated, all subsequent references to sections refer to the Public Utilities Code.

dredge used for maintenance of nearby levees. About 2000 acres in the McArthur Swamp parcel fall within the boundaries of License No. 2687, the Federal Energy Regulatory Commission (FERC) license PG&E holds to operate Pit 1, one of several hydroelectric generation facilities on the Pit River. PG&E's Pit 1 license renewal application, which is pending before FERC, seeks removal of these 2000 acres from the Pit 1 license.

A.00-05-030 concerns a two-part land transaction. First, PG&E proposes to exchange lands known as Bowman Ditch (four acres) and Burney Falls (182 acres) with the California Department of Parks and Recreation (DPR) in return for two things: (1) 544 acres of state-owned, flooded property in Shasta County that is part of the area commonly known as Ahjumawi Lava Springs State Park and (2) a release of any potential claims against PG&E for failure to maintain certain failed levees. Second, PG&E then proposes to transfer the Ahjumawi property to CWA subject to a conservation easement, deed restrictions that limit use of the property, and a document entitled the McArthur Swamp Management Plan; thereafter, CWA would enter into a Grazing Lease Agreement with the McArthur Resource Management Association, a consortium of ranchers who currently have grazing rights on portions of McArthur Swamp.

PG&E describes the exchange of Burney Falls and Bowman Ditch for the Ahjumawi property as an "in-kind" transfer that results in a non-taxable event. At the present time, approximately 112 acres of Burney Falls are located within FERC License No. 233, which authorizes PG&E to operate the hydroelectric project known as Pit 3, 4 and 5. FERC has already approved transfer of Burney Falls to DPR in fee subject to the license and PG&E has asked FERC to remove it from the project boundaries.

Notably, while the first part of the proposed A.00-05-030 transaction (the DPR exchange) is independent of approval of A.00-05-029, the second part (transfer of the Ahjumawi land to CWA) is contingent upon approval of A.00-05-029, since CWA will not accept the Ahjumawi land unless it also receives Burney Falls and the Glenburn Dredge Site.

The applications propose similar ratemaking proposals. Key aspects include: deducting the book value of the transferred properties, together with associated transaction costs, from the market value of Pit 1 before this value is entered into the Transition Cost Balancing Account (TCBA),² removing the costs associated with the transferred properties from the PG&E revenue requirement; and adjusting the rate base for Pit 1 to reflect retirement of assets associated with the transferred properties.

3. Procedural History

PG&E filed these applications on May 15, 2000. Following the first prehearing conference (PHC) on June 22, Administrative Law Judge (ALJ) Hale issued rulings on June 30, August 7, and October 2, 2000, that directed PG&E to amend both applications to address identified deficiencies in them. The August 7 ruling also consolidated the proceedings for hearing, but stated a separate decision would issue on each application. The Commission held a second PHC on October 25.

Subsequently, the Legislature passed and the Governor signed Assembly Bill 6 (Stats. 2001, 1st Ex. Sess., c.2), often referred to as AB 6X, which amended § 377, effective January 18, 2001, to require the retention of public utility

² Market valuation of Pit 1 is at issue in PG&E's hydroelectric proceeding, A.99-09-053.

generation assets until January 1, 2006. On February 28, 2001, these proceedings were reassigned to ALJ Vieth. Several months later, on April 6, 2001, PG&E filed for relief under Chapter 11 of the Bankruptcy Code. PG&E did not withdraw these applications, however, and since review in accordance with the California Environmental Quality Act (CEQA) had already commenced, that review continued. On October 30, 2001, the Environmental Branch of the Commission's Energy Division, together with its consultant, issued a Draft Mitigated Negative Declaration (MND) for public review and comment. A Final MND issued on January 24, 2002. Pursuant to the ALJ's ruling, the MND has been identified as Reference Exhibit A and placed in the formal files of this proceeding.

On May 13, 2002, ALJ Vieth issued a ruling requesting briefs on the application of AB 6X to these proposed land transfers. PG&E and the Commission's Office of Ratepayer Advocates (ORA) filed briefs and PG&E filed a reply brief. The reply brief stated PG&E's intent to amend both applications again to revise the ratemaking treatment proposed but in a subsequent letter, PG&E advised the ALJ that, upon reconsideration, it saw no need for a different ratemaking proposal and would not file amendments.

4. Discussion

In considering this Application, we are limited by § 377, which reads:

The commission shall continue to regulate the facilities for the generation of electricity owned by any public utility prior to January 1, 1997, that are subject to commission regulation until the owner of those facilities has applied to the commission to dispose of those facilities and has been authorized by the commission under Section 851 to undertake that disposal. Notwithstanding any other provision of law, no facility for the generation of electricity owned by a public utility may be disposed of prior to January 1, 2006. The commission shall ensure that public utility generation assets remain dedicated to service for the benefit of California ratepayers.

Thus, before we may consider the merits of these applications, we must address the threshold question—does § 377 bar the proposed land transactions?

The assets in question here were owned by PG&E prior to January 1, 1997. We must determine whether the assets that PG&E wants to dispose of are a facility or facilities for the generation of electricity. If so, such assets may not be disposed of prior to January 1, 2006. The obvious example of a facility used for the generation of electricity would be a power plant, which literally is a facility that generates electricity. Section 377 clearly bars disposal of power plants owned by public utilities.³

But we are left with the question of whether § 377 only bars disposal of a power plant, itself, or whether it has a broader scope. We must determine whether a facility for the generation of electricity includes more than just the power plant. For example, the land on which a power plant sits does not actually generate electricity, nor would it appear to be a facility. Does this mean that a utility could sell the land under a power plant, while keeping the power plant, itself? Or could a utility sell a reservoir that supplies water to a hydroelectric power plant?

Fortunately, the statute itself provides further guidance on this issue. The statute says that “public utility generation assets” are to remain dedicated to service for the benefit of California ratepayers. “Generation assets” is a term of art. This Commission has defined generation assets as including “nonplant physical assets.” (D.95-12-063, as modified by D.96-01-009, pp. 50-51.) PG&E

³ This is confirmed by the subsequent enactment of § 377.1, which expressly exempted six hydroelectric plants from the restrictions of § 377.

previously argued, and the Commission conceptually agreed, that generation assets include land. (D.97-11-074, pp. 63-64.)

The Uniform System of Accounts (USOA) of the FERC provides further confirmation that generation assets include more than just the power plant itself.⁴ Electric Plant Account 310 includes the cost of land and land rights associated with steam generation, and Account 330 includes land and land rights for hydroelectric generation. Accounts 311 and 331 include the respective costs of structures and improvements for steam and hydroelectric generation, while Account 332 includes the cost of reservoirs, dams, and waterways used for hydroelectric generation. In addition, Account 335 includes the cost of miscellaneous power plant equipment for hydroelectric generation, including equipment such as boats, barges, etc.

To the extent there is any potential conflict between the phrases “facility for the generation of electricity” and “generation asset,” that conflict can, and accordingly must, be harmonized. (See, e.g. *Wells v. Marina City Properties, Inc.* (1981) 29 Cal. 3d 781, 788; *Louisiana-Pacific Corp. v. Humboldt Bay Municipal Water District* (1982) 137 Cal. App. 3d 152, 156.) Rather than disregarding the words “generation assets” and their well-established meaning, we construe the words “facility for generation of electricity” to have the same breadth.

The PG&E and ORA briefs do not include this line of statutory interpretation. Instead, they argue that § 377 does not bar the land transfers at issue, primarily because none of the properties have generation plants on them, most of the land is undeveloped and the developments that do exist are minor

⁴ Utilities conform their records to the USOA. See, e.g. *Resource*, 2nd Edition 1992.

ones that are not used to generate electricity. While these are accurate observations, it is also true that each parcel is located within one of the watersheds supplying PG&E's hydroelectric facilities. Indisputably, the dredge and all of the land have been included as assets in PG&E's generation rate base for various periods prior to January 1, 1997. Neither brief discusses the long-established meaning of the term "generation assets".

PG&E's brief assumes that the differing terminology in the last two sentences of § 377 gives rise to ambiguity. PG&E argues that we must use extrinsic sources of legislative intent as a basis for, in essence, eliminating the words "generation assets" from the statute. At a minimum, PG&E's argument would require us to ignore the widely recognized regulatory meaning of those words. Instead, we will adhere to the well-established meaning of the term "generation assets" and conclude that the statute as written is not ambiguous. The assets that are the subject of these applications fall within the standard definition of generation assets. Section 377 bars not just the disposal of power plants, but also the generation assets at issue here. Accordingly, we are legally barred from authorizing PG&E to dispose of McArthur Swamp, the Glenburn Dredge Site and associated dredge, Bowman Ditch, and Burney Falls, since § 377 does not provide us with discretion to exempt some kinds or classes of generation assets from its reach.

We note that recently enacted § 377.1 creates an express exemption from § 377 for the particular utility assets named in that new statute. Section 377.1 illustrates the legislative prerogative to amend statutes or to create express exemptions from them, authority that this Commission lacks. Parties may wish to explore the availability of legislative remedies with respect to the utility assets at issue in this proceeding.

Since we dismiss these applications on the same basis without reaching the merits, there is no need to issue separate decisions. Accordingly, contrary to the ALJ's prior determination that separate decisions would issue, we address both applications in today's order.

5. Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with § 311(g)(1) and Rule 77/7 of the Rules of Practice and Procedure.

6. Assignment of Proceeding

Loretta M. Lynch is the Assigned Commissioner and Jean Vieth is the assigned ALJ in this proceeding.

Findings of Fact

1. The land and dredge at issue in these applications have been included in PG&E's generation rate base since prior to January 1, 1997.
2. Since we dismiss these applications on the same basis without reaching the merits, there is no need to issue separate decisions.

Conclusions of Law

1. Commission precedent defines "generation assets" to include nonplant physical assets and land.
2. The USOA established by FERC confirm that generation assets include more than power plants, since separate accounts exist for elements ranging from the cost of land and land rights for hydroelectric generation to the cost of miscellaneous power plant equipment, such as boats and barges.

3. Section 377 bars the Commission from authorizing PG&E to dispose of McArthur Swamp, the Glenburn Dredge Site and associated dredge, Bowman Ditch, and Burney Falls.

4. Today's order properly dismisses both applications.

5. In order to eliminate uncertainty in the parties' business dealings, this order should be effective immediately.

O R D E R

IT IS ORDERED that:

1. Application (A.) 00-05-029 and A.00-05-030 are dismissed without prejudice under Pub. Util. Code § 377.
2. These proceedings are closed.

This order is effective today.

Dated _____, at San Francisco, California.